

1 **LUM, DANZIS, DRASCO & POSITAN, LLC**
2 103 Eisenhower Parkway
3 Roseland, NJ 07068
4 Telephone: (973) 403-9000
5 Fax: (973) 403-9021
6 (DD2022)(KO9378)

7 **COVINGTON & BURLING**
8 1201 Pennsylvania Avenue, N.W.
9 Washington, D.C. 20004
10 Telephone: (202) 662-6000
11 Fax: (202) 662-6291
12 Attorneys for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

11 NATIONAL CITY BANK OF INDIANA,
12 FIRST FRANKLIN FINANCIAL
13 CORPORATION, and NATIONAL CITY
14 MORTGAGE CO.,

15 Plaintiffs,

16 -vs-

17 HOLLY C. BAKKE,
18 in her official capacity as Commissioner of the
19 New Jersey Department of Banking and
20 Insurance,

21 Defendant.

Civil Action No.

3-04-3914
(SRC)

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODCUTION

1. New Jersey law provides that subsidiaries of national banks must be licensed by the New Jersey Department of Banking and Insurance ("Department"), through Defendant Commissioner, and must be subject to the Department's regulatory, supervisory, examination, and enforcement jurisdiction, in order to make and service residential mortgage loans in New Jersey. The Department, through Defendant Commissioner, has asserted that First Franklin Financial Corporation ("First Franklin"), a wholly-owned operating subsidiary of a national bank, has violated a New Jersey state law that bars the charging of any prepayment penalty on adjustable rate mortgages ("ARMs"). On June 30, 2004, the Commissioner sent First

1 Franklin a letter requiring it to comply with that state-law requirement within five business days
2 with respect to a particular mortgage loan. The Commissioner deemed First Franklin to be
3 subject to the jurisdiction and regulation of the Department, and stated that the Department's
4 jurisdiction covers all of First Franklin's loans in New Jersey. In response, First Franklin
5 waived its right to collect a prepayment penalty with respect to that single loan, but reserved its
6 rights with respect to hundreds of other ARMs issued by First Franklin in New Jersey.

7 2. On July 27, 2004, the Department notified First Franklin that pursuant to
8 the authority granted to the Commissioner by the laws of the State of New Jersey, it would
9 conduct an examination of First Franklin's operations commencing the week of August 18,
10 2004. The notice of examination demands that First Franklin gather and produce extensive
11 documentation, including documentation regarding the prepayment fees it has charged on its
12 ARMs since January 1, 2002.

13 3. This complaint seeks declaratory and injunctive relief on behalf of
14 National City Bank of Indiana a federally chartered national bank, and its wholly owned
15 operating subsidiaries First Franklin and National City Mortgage Co. ("NCMC"), owned and
16 operated by National City Bank of Indiana pursuant to the National Bank Act and regulations
17 promulgated under that Act by the Office of the Comptroller of the Currency ("OCC").

18 4. The OCC is the federal agency responsible for interpreting and applying
19 the National Bank Act. Under that Act and OCC regulations, the OCC has exclusive licensing,
20 regulatory, supervisory, examination, and enforcement authority over National City Bank of
21 Indiana, First Franklin, and NCMC. Accordingly, the OCC can, and does, regulate and
22 regularly examine National City Bank of Indiana, First Franklin, and NCMC to enforce their
23 compliance with both federal and non-preempted state laws.

24 5. Pursuant to 12 U.S.C. § 371(a), "[a]ny national banking association may
25 make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real
26 estate, subject to section 1828(o) of this title and such restrictions and requirements as the
27 Comptroller of the Currency may prescribe by regulation or order." The OCC has promulgated
28 a regulation that expressly provides: "A national bank offering or purchasing ARM loans may

1 impose fees for prepayments notwithstanding any State law limitations to the contrary."
 2 12 C.F.R. § 34.23. See also 12 C.F.R. §34.21 ("A national bank and its subsidiaries may make,
 3 sell, purchase, participate in, or otherwise deal in ARM loans and interests therein without
 4 regard to any state law limitations on those activities.").

5 6. Pursuant to N.J. Stat. Ann. § 46:10B-2, "[p]repayment of a mortgage loan
 6 may be made by or on behalf of a mortgagor at any time without penalty." In addition, pursuant
 7 to N.J. Stat. Ann. § 46:10B-4, prepayment penalty provisions are unenforceable. Pursuant to
 8 N.J. Stat. Ann. § 17:11C-22(c), a licensee may not "charge or exact directly or indirectly from
 9 the mortgagor or any other person fees, commissions or charges not authorized by this act."
 10 Pursuant to a regulation promulgated by Defendant Commissioners, a borrower "may repay a
 11 first mortgage loan, second mortgage loan or consumer loan at any time without penalty."
 12 N.J.Admin.Code, 3:15-10.1(b).

13 7. Plaintiffs, faced with the Commissioner's demand that First Franklin
 14 comply with the preempted New Jersey prohibition on prepayment penalties and submit to an
 15 extensive examination in violation of the OCC's exclusive federal supervisory jurisdiction,
 16 bring this suit against the Commissioner for declaratory and injunctive relief to vindicate the
 17 federal rights of National City Bank of Indiana, First Franklin, and NCMC under the Supremacy
 18 Clause of the U.S. Constitution, the National Bank Act, and implementing OCC regulations.

19 JURISDICTION AND VENUE

20 8. This action is brought under the National Bank Act, the Supremacy
 21 Clause of the United States Constitution, and 42 U.S.C. § 1983. The Court has jurisdiction over
 22 this action pursuant to 28 U.S.C. § 1331, because it arises under the Constitution and laws of the
 23 United States. In addition, jurisdiction is proper under 28 U.S.C. § 1343(a)(3), because
 24 Defendant, under color of state law, seeks to deprive Plaintiffs of their federal constitutional
 25 rights. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201
 26 and 2202.

10. National City Bank of Indiana is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq.* National City Bank of Indiana maintains its main office and principal place of business in Indianapolis, Indiana. National City Bank of Indiana has no branches in New Jersey. Pursuant to the National Bank Act and implementing OCC regulations, National City Bank of Indiana has established, wholly owns, and operates First Franklin and NCMC as operating subsidiaries to conduct the majority of the Bank's residential mortgage lending.

11. First Franklin is organized as an operating subsidiary of National City Bank of Indiana pursuant to OCC regulations issued under the National Bank Act. First Franklin is incorporated in Delaware and has its principal place of business in San Jose, California. First Franklin does residential mortgage lending business throughout the United States, including New Jersey. First Franklin provides ARMs in New Jersey to which the New Jersey prepayment restriction purportedly applies.

12. NCMC is organized as an operating subsidiary of National City Bank of Indiana pursuant to OCC regulations issued under the National Bank Act. NCMC is incorporated in Ohio and has its principal place of business in Ohio. NCMC does residential mortgage lending business throughout the United States, including New Jersey.

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1 enforcing the New Jersey prepayment penalty restriction against New Jersey residential
2 mortgage lenders subject to New Jersey law. *Id.* §§ 17:11C-47-48.

3 THE NATIONAL BANK ACT AND OCC REGULATIONS

4 14. National banks are federally-chartered institutions created under and
5 governed by the National Bank Act, 12 U.S.C. § 21 *et seq.*

6 15. Under the National Bank Act and other federal banking laws, the OCC
7 has exclusive licensing, regulatory, supervisory, examination, and enforcement authority with
8 respect to national banks' compliance with both federal and non-preempted state laws. *See* 12
9 U.S.C. §§ 24(Seventh), 484(a), 1818(b); *see also* 12 C.F.R. § 7.4000.

10 16. Congress has authorized national banks to receive deposits, loan money,
11 and to exercise "all such incidental powers as shall be necessary to carry on the business of
12 banking." 12 U.S.C. § 24(Seventh). These incidental powers under 12 U.S.C. § 24(Seventh)
13 include the authority to provide banking services through operating subsidiaries.

14 17. Under an OCC regulation interpreting and implementing § 24(Seventh),
15 12 C.F.R. § 5.34, national banks are expressly authorized to establish and own operating
16 subsidiaries, which may conduct only activities that are lawful activities for the parent national
17 bank itself. 12 C.F.R. § 5.34(d)(1). The OCC's operating-subsidary regulation further provides
18 for a licensing application to and approval from the OCC before an operating subsidiary is
19 established or acquired by a national bank. *See, e.g., id.* § 5.34(e)(5). The OCC's regulation
20 also makes clear that operating subsidiaries are subject to the OCC's ongoing supervision,
21 regulation, examination, and enforcement authority. *See id.* § 5.34(e)(3).

22 18. Because operating subsidiaries conduct only national bank-authorized
23 activities, and therefore function as separately-incorporated divisions or departments of the
24 national bank itself, and because operating subsidiaries are subject to ongoing licensing,
25 regulation, supervision, examination, and enforcement by the OCC, the OCC's regulations
26 further provide that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws
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1 apply to national bank operating subsidiaries to the same extent that those laws apply to the
2 parent national bank.” 12 C.F.R. § 7.4006.

3 19. Under 12 U.S.C. § 484(a), “[n]o national bank shall be subject to any
4 visitorial powers except as authorized by Federal law, vested in the courts of justice or such as
5 shall be, or have been exercised or directed by Congress or by either House thereof or by any
6 committee of Congress or of either House duly authorized.” Section 484(b) provides a limited
7 exemption to this exclusive federal regulatory, supervisory, and examination jurisdiction of
8 national banks but only “to ensure compliance with applicable State unclaimed property or
9 escheat laws upon reasonable cause to believe that the bank has failed to comply with such
10 laws.” 12 U.S.C. § 484(b).

11 20. Interpreting § 484, the OCC’s regulations provide that “[o]nly the OCC
12 or an authorized representative of the OCC may exercise visitorial powers with respect to
13 national banks, except as provided [in the OCC’s regulation interpreting 12 U.S.C. § 484(b)].
14 State officials may not exercise visitorial powers with respect to national banks, such as
15 conducting examinations, inspecting or requiring the production of books or records of national
16 banks, or prosecuting enforcement actions, except in limited circumstances authorized by
17 federal law.” 12 C.F.R. § 7.4000(a)(1). The OCC’s regulation defines “visitorial powers” to
18 include “[e]xamination of a bank”; “[i]nspection of a bank’s books and records”; “[r]egulation
19 and supervision of activities authorized or permitted pursuant to federal banking law”; and
20 “[e]nforcing compliance with any applicable federal or state laws concerning those activities.”
21 *Id.* § 7.4000(a)(2). Further, by virtue of 12 C.F.R. § 7.4006, the protections afforded to national
22 banks from state licensing, regulation, supervision, examination, and enforcement also apply to
23 operating subsidiaries of national banks.

24 21. The First Senior Deputy Comptroller and Chief Counsel of the OCC has
25 issued a letter confirming that “pursuant to 12 U.S.C. § 484, and 12 C.F.R. §§ 5.34(e)(3) and
26 7.4006, the OCC has exclusive visitorial authority over national banks and their operating
27 subsidiaries except where *Federal* law provides otherwise.” (Exhibit 1 hereto, p. 2.) The
28 OCC’s letter continues: “As a result, States are precluded from examining or requiring

1 information from national banks or their operating subsidiaries.” *Id.* The OCC explains that “it
 2 is well established that a State may not condition a national bank’s exercise of a permissible
 3 Federal power on obtaining the State’s prior approval, including the imposition of State
 4 licensing requirements as a predicate to the exercise of that power. The result is the same
 5 whether the national bank exercises the power directly, or through an operating subsidiary that
 6 has been licensed by the OCC. In both cases, the bank, or the operating subsidiary, has obtained
 7 a *Federal* license to conduct its business.” *Id.* at 6. This letter follows earlier letters issued by
 8 the OCC to the same effect.

9 22. In addition, the OCC has filed briefs as *amicus curiae* in *Wells Fargo*
 10 *Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003), *National City Bank v. Boutris*,
 11 No. CIV. S-03-0655 GEB, 2003 WL 21536818 (E.D. Cal. Jul 02, 2003), *Wachovia Bank, N.A. v.*
 12 *Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004), and *Wachovia Bank, N.A. et al. v. Watters*, No.
 13 5:03-cv-00105-RHB (W.D. Mich. July 21, 2003), confirming that operating subsidiaries of
 14 national banks are subject to the exclusive visitorial powers of the OCC and states cannot
 15 exercise any licensing, regulatory, supervisory, or enforcement authority over such entities.
 16 Accordingly, the OCC argued in its briefs, efforts by state banking officials to exercise visitorial
 17 powers over operating subsidiaries of national banks, and to interfere with their federally-
 18 authorized banking activities, are preempted.

19 23. Pursuant to 12 U.S.C. § 371(a), “[a]ny national banking association may
 20 make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real
 21 estate, subject to section 1828(o) of this title and such restrictions and requirements as the
 22 Comptroller of the Currency may prescribe by regulation or order.” The OCC has promulgated
 23 a regulation, codified at 12 C.F.R. § 34.23, that expressly provides: “A national bank offering
 24 or purchasing ARM loans may impose fees for prepayments notwithstanding any State law
 25 limitations to the contrary.” See also 12 C.F.R. § 34.21 (“A national bank and its subsidiaries
 26 may make, sell, purchase, participate in, or otherwise deal in ARM loans and interests therein
 27 without regard to any State law limitations on those activities.”).

24. Pursuant to N.J. Stat. Ann. § 46:10B-2, “[p]repayment of a mortgage loan may be made by or on behalf of a mortgagor at any time without penalty.” In addition, N.J. Stat. Ann. § 46:10B-4 provides that prepayment penalty provisions in mortgages issued by national bank operating subsidiaries are unenforceable. Pursuant to N.J. Stat. Ann. § 17:11C-22(c), a licensee may not “charge or exact directly or indirectly from the mortgagor or any other person fees, commissions or charges not authorized by this act.” *See also id.* § 17:11C-23 (prohibiting licensees from charging any fee not authorized by the commissioner by regulation); N.J.Admin.Code 3:15-10.1(b)(allowing borrower to prepay mortgage at anytime without interest).

25. The OCC has issued a letter confirming that national banks may impose prepayment fees in connection with purchase money arm loans under the OCC’s ARM regulation notwithstanding state law. *See* Letter of Nov. 4, 1999 from Eric Thompson, Director, Bank Activities and Structure, to Gregory J. Pulles, General Counsel, TCF Financial Corporation. The letter confirms that 12 U.S.C. § 371 “specifically provides authority for national banks to make real estate loans subject to OCC regulations and orders,” and “[t]he OCC ARM regulations themselves contain an express preemption of state law restrictions on prepayment fees.” (Exhibit 2 hereto, at pp. 1-2). The letter explains that the OCC “has long recognized that the ability to charge prepayment fees in connection with ARM loans provides lenders and borrowers with additional flexibility,” and this “could encourage the development of ARMs with relatively slow-moving interest rate indexes and long adjustment periods.” *Id.*

26. Title 17:11C, N.J.Stat. Ann., entitled “Licensed Lenders” includes provisions concerning licensing requirements, the Commissioner’s examination authority, and enforcement of state law. Mortgage bankers, mortgage brokers, and persons engaged in the secondary mortgage loan business in New Jersey, among others, are required to apply for and obtain a state license. National banks are exempted from this licensing requirement, but their subsidiaries are not. N.J. Stat. Ann. §§ 17:11C-4(a), 17:11C-5(a). The Commissioner is authorized to conduct examinations of any licensed lender. *Id.* §17:11C-42. The Commissioner may suspend or revoke a license for cause. *Id.* § 17:11C-18. In addition, the Commissioner is

1 also authorized to seek an injunction on behalf of the State against a person or institution to
 2 enjoin continuing practices that violate New Jersey law. *Id.* § 17:11C-47. The Commissioner
 3 may also seek penalties of up to \$5,000 for each violation and restitution of the fee. *Id.*
 4 § 17:11C-48. Pursuant to N.J. Stat. Ann. § 46:10B-5, the borrower is authorized to bring an
 5 action seeking to recover a prepayment penalty, plus interest, in state court.

6 **THE PRESENT CONTROVERSY**

7 27. National City Bank of Indiana owns operating subsidiaries, First Franklin
 8 and NCMC, to undertake a portion of the Bank's residential mortgage lending business
 9 throughout the United States, including New Jersey. In doing so, the Bank has exercised its
 10 federal authority under 12 U.S.C. § 24(Seventh), and OCC regulations interpreting that statute,
 11 12 C.F.R. § 5.34, by applying for and receiving the OCC's permission to establish, acquire, and
 12 operate First Franklin and NCMC.

13 28. First Franklin and NCMC function as separately incorporated
 14 departments or divisions of the Bank. First Franklin and NCMC, just like National City Bank of
 15 Indiana itself, are each subject to ongoing licensing, regulation, supervision, and enforcement by
 16 the OCC, and have been examined by the OCC on multiple occasions, with respect to its
 17 compliance with both federal and non-preempted state laws.

18 29. New Jersey law provides that First Franklin and NCMC nonetheless are
 19 required to hold a license from the Commissioner in order to engage in the residential mortgage
 20 business in New Jersey. First Franklin and NCMC presently hold such a license, and the
 21 Commissioner has asserted full regulatory, supervisory, examination, and enforcement authority
 22 over First Franklin. The Commissioner has conducted audits and examinations of First Franklin
 23 and NCMC and required First Franklin and NCMC to submit periodic reports of condition to
 24 her or a designated official at the Department.

25 30. By letter dated May 21, 2004, the Department informed First Franklin
 26 that it had received a complaint from a borrower concerning a prepayment penalty provision in
 27 an ARM loan agreement entered into with First Franklin. The letter stated that "[a]s of July 1,
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1 2003, all New Jersey licensed lenders are subject to the aforementioned prepayment penalty law
2 and can no longer claim federal preemption pursuant to the Alternative Transactions Parity Act
3 of 1982." ("Parity Act") (Exhibit 3 hereto). The letter asked First Franklin to provide a written
4 response to the complaint, including extensive documentation.

5 31. First Franklin responded in a letter dated June 15, 2004, enclosing the
6 documentation requested by the Department and advising the Department that First Franklin is
7 not asserting preemption of New Jersey's prepayment penalty provision under the Parity Act.
8 Instead, First Franklin explained, First Franklin as an operating subsidiary of a national bank, is
9 subject to the regulations of the OCC promulgated pursuant to the National Bank Act. Pursuant
10 to 12 U.S.C. § 371, the OCC has issued 12 C.F.R. § 34.23, which preempts state limits on
11 prepayment penalties for adjustable rate mortgage loans. Consequently, the letter concludes, the
12 New Jersey restrictions on prepayment penalties are not applicable to Ms. Jones' mortgage loan.
13 (Exhibit 4 hereto).

14 32. By letter dated June 30, 2004, the Department stated that it had reviewed
15 First Franklin's letter of June 15, 2004, and that "the Department does not recognize your
16 Corporation's claim of federal preemption over New Jersey Statutes and Regulations predicated
17 on your status as an operating subsidiary of a national bank, National City Bank of Indiana,
18 pursuant to Section 371 of the National Bank Act." (Exhibit 5 hereto) The letter further states:
19 "Your Corporation is subject to the same New Jersey mortgage banking statutes and regulations
20 as any other licensee." The letter continues: "First Franklin Corporation is deemed subject to
21 the jurisdiction and regulation of the Department, [and] this jurisdiction covers all New Jersey
22 loans closed including that of Ms. Jones. Your Corporation is in violation of 'N.J.S.A. 46:10B-
23 **2. Prepayment of mortgage loan without penalty.**'" The letter further states: "**First**
24 **Franklin Financial Corporation must immediately remove the subject prepayment penalty**
25 **provision assessing a prepayment penalty from the consumer's mortgage loan note within**
26 **five (5) business days upon receipt of this correspondence.** The Division of Banking will
27 seriously consider litigation of this matter if your Corporation decides to challenge the subject
28 Directive." (Emphasis in original).

1 33. On July 8, 2004, First Franklin responded with a letter to the Department
 2 stating that, for the reasons explained in its letter of June 15, it "continues to believe that the
 3 prepayment penalty is authorized by federal law." (Exhibit 6 hereto). "[I]n an effort to address
 4 the particular situation presented," First Franklin agreed to pay any prepayment charge assessed
 5 under the borrower's note. *Id.* First Franklin emphasized that its action was "without prejudice
 6 to its rights under federal law with respect to any other mortgage loan." *Id.*

7 34. On July 27, 2004, the Department notified First Franklin that "[p]ursuant
 8 to the authority granted to the Commissioner by the laws of the State of New Jersey," it intends
 9 to conduct an examination of First Franklin's operations commencing the week of August 18,
 10 2004. (Exhibit 7 hereto). The notice of examination demands that First Franklin produce
 11 extensive documentation, including regarding the prepayment fees it has charged on its ARMs
 12 since January 1, 2002, and indicates that "[f]ailure to have the requested information ready for
 13 the examiner" could result in "a lower rating for your company, a lengthier examination and
 14 more frequent monitoring."

15 35. A case or controversy between the parties exists requiring resolution by
 16 this Court.

17 CLAIMS FOR RELIEF

18 COUNT I

19 **Declaratory and Injunctive Relief:**

20 **Preemption of New Jersey Licensed Lenders Act by**

21 **12 U.S.C. §§ 24(Seventh), 484 and 12 C.F.R. § 7.4006**

22 36. Plaintiffs incorporate and reallege each and every allegation contained in
 23 each of the preceding paragraphs of this Complaint as though fully set forth herein.

24 37. Under the National Bank Act and other federal banking laws as well as
 25 OCC regulations interpreting those laws, the OCC has exclusive licensing, regulatory,
 26 supervisory, examination, and enforcement authority with respect to national banks' compliance
 27 with both federal and non-preempted state laws. *See* 12 U.S.C. §§ 24(Seventh), 484(a),
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1 1818(b); 12 C.F.R. § 7.4000. National banks are not required to obtain or hold state licenses in
2 order to do business in any state.

3 38. Under OCC regulation 12 C.F.R. § 5.34, national banks may establish,
4 own, and operate operating subsidiaries to undertake only those activities that are authorized for
5 a national bank itself. This regulation provides that an operating subsidiary is also subject to
6 ongoing licensing, regulatory, supervisory, examination, and enforcement authority by the OCC
7 with respect to such subsidiary's compliance with both federal and non-preempted state laws.

8 39. Another OCC regulation further prescribes that "[u]nless otherwise
9 provided by Federal law or OCC regulation, State laws apply to national bank operating
10 subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R.
11 § 7.4006.

12 40. The OCC has recently confirmed in interpretive letters and briefs as
13 *amicus curiae* that, under 12 C.F.R. § 7.4006, an operating subsidiary is subject to the exclusive
14 regulatory, supervisory, examination, and enforcement authority of the OCC, with respect to its
15 compliance with both federal and non-preempted state laws, and is therefore not subject to such
16 licensing, regulation, supervision, examination, and enforcement authority of a state regulator
17 like the Commissioner. In prior cases, courts have found that "[t]he OCC's amicus brief and
18 interpretive letter appear to be 'both persuasive and consistent with the National Bank Act and
19 OCC regulations and thus at least 'entitled to respect.'" *Wells Fargo Bank, N.A. v. Boutris*, 252
20 F. Supp. 2d 1065, 1072 (E.D. Cal. 2003) (quoting *Bank of America v. City and County of San*
21 *Francisco*, 309 F.3d 551, 563 n.7 (9th Cir. 2002)).

22 41. The New Jersey Licensed Lenders Act, in particular Sections 17:C11-3,
23 47-49, which subject national banks' operating subsidiaries like First Franklin to ongoing
24 licensing, regulation, supervision, examination, and enforcement by the Commissioner, is
25 preempted as it applies to national bank operating subsidiaries by the exclusive federal
26 licensing, regulatory, supervisory, examination, and enforcement powers of the OCC.

27 42. Under federal law, the OCC is the exclusive enforcer of all laws against
28 national banks as well as their operating subsidiaries. First Franklin and NCMC, as operating

1 subsidiaries of a national bank, need not hold a license from State of New Jersey in order to
 2 engage in the residential mortgage lending and servicing business in New Jersey. The OCC has
 3 granted a license to National City under 12 C.F.R. § 5.34 to conduct mortgage lending activities
 4 through First Franklin and NCMC.

5 43. N.J. Stat. Ann. §§ 17:C11-3, 47-49, as applied to national banks'
 6 operating subsidiaries, for purposes of empowering the Commissioner to regulate, supervise, or
 7 act as an enforcement official is preempted under Article VI of the United States Constitution,
 8 by the National Bank Act, 12 U.S.C. §§ 24(Seventh) and 484, and by other provisions of the
 9 federal banking laws and OCC implementing regulations, because the OCC has exclusive
 10 licensing, regulatory, supervisory, examination, and enforcement authority over national banks'
 11 operating subsidiaries.

12 COUNT II

13 **Declaratory and Injunctive Relief:**

14 **Preemption of New Jersey Licensed Lenders Act by**

15 **12 U.S.C. §§ 24(Seventh) and 484**

16 44. Plaintiffs incorporate and reallege each and every allegation contained in
 17 each of the preceding paragraphs of this Complaint as though fully set forth herein.

18 45. National banks have authority under the National Bank Act to receive
 19 deposits, loan money, and to exercise "all such incidental powers as shall be necessary to carry
 20 on the business of banking." 12 U.S.C. § 24(Seventh).

21 46. The OCC's regulations implementing the National Bank Act provide that
 22 national banks are expressly authorized to establish and own operating subsidiaries, which are
 23 permitted to conduct only those activities that are lawful activities for the parent national bank
 24 itself. 12 C.F.R. § 5.34(d)(1). The OCC's regulations further provide that a national bank's
 25 operating subsidiary may exercise the parent national bank's enumerated federal lending and
 26 incidental powers to engage in the "business of banking" under 12 U.S.C. § 24(Seventh) on the
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1 same basis as the parent bank. *See* 12 C.F.R. §§ 5.34(e)(1), 7.4006. This interpretation was
 2 confirmed in recent OCC interpretive letters and in *amicus* briefs.

3 47. New Jersey law subjects national banks' operating subsidiaries to
 4 ongoing state licensing, regulation, supervision, examination, and enforcement authority by the
 5 Commissioner in the face of the OCC's exclusive licensing, regulation, supervision,
 6 examination, and enforcement authority regarding such subsidiaries. By seeking to subject
 7 national banks' operating subsidiaries to such additional, ongoing state licensing, regulation,
 8 supervision, examination, and enforcement authority, New Jersey law directly conflicts with
 9 national banks' ability to conduct their activities through federally licensed operating
 10 subsidiaries, including such banks' lending activities, as authorized by the National Bank Act
 11 and OCC regulations adopted pursuant to that Act.

12 48. The New Jersey Licensed Lenders Act, in particular N.J. Stat. Ann.
 13 §§ 17:C11-3, 47-49, therefore is preempted as applied to national banks' conduct of their
 14 federally authorized activities through operating subsidiaries under Article VI of the United
 15 States Constitution and by 12 U.S.C. § 24(Seventh) and other provisions of the National Bank
 16 Act and federal banking laws, as they are implemented by the OCC's regulations, including 12
 17 C.F.R. §§ 5.34 and 7.4006.

18 COUNT III

19 **Declaratory and Injunctive Relief:**

20 **Preemption of N.J.S.A. 46:10B-2 and 10B-4 and N.J.Admin.Code 3:15-10.1(b) by**

21 **12 U.S.C. § 371 and 12 C.F.R. § 34.23**

22 49. Plaintiffs incorporate and reallege each and every allegation contained in
 23 each of the preceding paragraphs of this complaint as fully set forth herein.

24 50. Pursuant to 12 U.S.C. § 371(a), "[a]ny national banking association may
 25 make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real
 26 estate, subject to section 1828(o) of this title and such restrictions and requirements as the
 27 Comptroller of the Currency may prescribe by regulation or order. The OCC has promulgated a
 28

1 regulation, codified at 12 C.F.R. § 34.23, that expressly provides: "A national bank offering or
2 purchasing ARM loans may impose fees for prepayments notwithstanding any State law
3 limitations to the contrary."

4 51. In conflict with the express terms of 12 C.F.R. § 34.23, N.J. Stat Ann.
5 46:10B-2 provides that "[p]repayment of a mortgage loan may be made by or on behalf of a
6 mortgagor at any time without penalty" and § 46:10B-4 provides that such prepayment
7 provisions are unenforceable. Similarly, N.J.Admin.Code 3:15-10.1(b) provides that a borrower
8 may repay a mortgage loan "at any time without penalty".

9 52. N.J. Stat. Ann. §§ 46-10B-2 and 10B-4, and N.J.Admin.Code 3:15-
10 10.1(b), are therefore expressly preempted by 12 C.F.R. § 34.23 and as a result are invalid under
11 Article VI of the United States Constitution.

12 **PRAYER FOR RELIEF**

13
14 WHEREFORE, Plaintiffs, National City Bank of Indiana, First Franklin
15 Financial Corporation and National City Mortgage Co., demand judgment against defendant,
16 Holly C. Bakke, in her official capacity as Commissioner of the New Jersey Department of
17 Banking and Insurance, for the following relief:

18 A. Entering a judgment declaring that the New Jersey Licensed Lenders Act,
19 as applied to national banks' operating subsidiaries, and as applied to national banks' conduct of
20 their federally authorized activities through such subsidiaries, is null and void and unenforceable
21 because it is preempted under Article VI of the United States Constitution, by the National Bank
22 Act, and by implementing OCC regulations;

23 B. Entering a judgment declaring that the N.J. Stat. Ann. §§ 46:10B-2 and
24 10B-4 and N.J.Admin.Code 3:15-10.1(b), are null and void and unenforceable because it is
25 expressly preempted under Article VI of the United States Constitution by 12 U.S.C. § 371 and
26 12 C.F.R. § 34.23;

1 C. Entering a permanent injunction, Plaintiffs having no adequate remedy at
2 law and suffering irreparable injury as a result of these unconstitutional state laws, enjoining
3 Defendant and his agents from enforcing or taking any action to enforce the New Jersey
4 Licensed Lender Act against Plaintiffs; from taking any action to prevent or interfere with, both
5 directly and indirectly, Plaintiffs' business operations in New Jersey (including taking any
6 actions to penalize Plaintiffs); and from otherwise exercising visitorial powers over Plaintiffs;

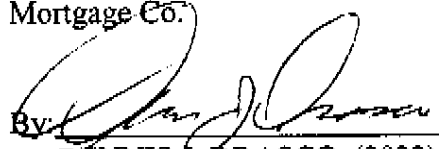
7 D. Entering a preliminary injunction pending final resolution of this action,
8 Plaintiffs having no adequate remedy at law and suffering irreparable injury as a result of these
9 unconstitutional state laws, enjoining Defendant and his agents from enforcing or taking any
10 action to enforce the New Jersey Licensed Lenders Act, against Plaintiffs; from taking any
11 action to prevent or interfere with, both directly and indirectly, Plaintiffs' business operations in
12 New Jersey (including taking any actions to penalize Plaintiffs); and from otherwise exercising
13 visitorial powers over Plaintiffs;

14 E. Awarding Plaintiffs their reasonable attorneys' fees pursuant to 42 U.S.C.
15 § 1988; and

16 F. Granting Plaintiffs such other and further relief, including costs, as the
17 Court may deem just and proper.
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2 Respectfully submitted,

3 **LUM, DANZIS, DRASCO & POSITAN, LLC**
4 Attorneys for Plaintiffs, National City Bank of Indiana,
5 First Franklin Financial Corporation and National City
6 Mortgage Co.

7 By: 
8 DENNIS J. DRASCO (2022)
9 A Member of the Firm

10
11 E. EDWARD BRUCE (*pro hac vice* pending)
12 STUART C. STOCK (*pro hac vice* pending)
13 ROBERT A. LONG, Jr. (*pro hac vice* pending)
14 EMILY JOHNSON HENN (*pro hac vice* pending)
15 BENJAMIN C. BLOCK (*pro hac vice* pending)

16 **COVINGTON & BURLING**
17 1201 Pennsylvania Avenue, N.W.
18 Washington, D.C. 20044
19 Telephone: (202) 662-6000
20 Fax: (202) 662-6291

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28 Dated: August 16, 2004

CERTIFICATION PURSUANT TO L.Civ.R.11.2

Pursuant to L.Civ.R.11.2, the undersigned certifies that the matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding. Nor is any other action or arbitration proceeding contemplated.


DENNIS J. DRASCO (2022)

DATED: August 16, 2004

EXHIBIT 1